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No. 91-72

In the Supreme Court of the United States

OCTOBER TERM, 1991

FEDERAL TRADE COMMISSION, PETITIONER

v.

TICOR TITLE INSURANCE CO., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

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1. Respondents assert (Br. in Opp. 13) that the petition "proposes a new and quite different standard—neither applied in [the FTC's] own decision nor presented in its brief to the Court of Appeals." *Ibid.* That assertion is incorrect.

In its opinion, the Commission described the active supervision requirement as follows:

> [A] state official or agency must engage in affirmative, substantive review of the challenged conduct before active supervision can be found. Such review ensures that the state agency has consciously considered the anticompetitive consequence of the activity for which private parties seek approval. * * * [n]o clear inference of conscious state approval of the product of private collective ratemaking can be drawn from a state agency's passive acceptance or non-substantive review of rate filings." *Thus, we hold that the active supervision requirement is satisfied only where the state agency has acted affirmatively to review and approve the proposed tariff or rate.*

Pet. App. 55a (emphasis added) (quoting *New England Motor Rate Bureau, Inc.*, Dkt. No. 91-70 (F.T.C. Aug. 18, 1989), slip op. 15).

Similarly, the FTC's brief in the court of appeals summarized its holding as follows: "[T]he Commission held that the active state supervision requirement is met only where the state supervisory agency has authority to supervise the challenged private conduct *and actually exercises that control by engaging in a review of the merits of the challenged conduct as part of a program of supervision.*" Gov't C.A. Br. 31 (emphasis added). Thus, the petition for certiorari, the FTC's brief in the court of appeals, and the FTC's opinion all adhere to the same essential standard: The active supervision requirement is met only if state officials actually determine that the particular private anticompetitive activity at issue is consistent with the State's regulatory policies.[1]

Respondents nevertheless contend (Br. in Opp. 5, 6-7), on the basis of two isolated statements in the Commission's opinion, that the Commission applied a "meaningfulness" standard, under which it "evaluated the merits and quality of state regulatory decisions." Considered in context, the Commission's statements merely emphasize the point that "meaningful" activity, for purposes of the active supervision requirement, consists of an actual determination that the private anticompetitive activity at issue meets the State's regulatory criteria.[2]

The Commission's reference to "meaningful" review in Wisconsin, read in context, refers to the requirement

[1] Even if the FTC had applied the wrong standard—which it did not—that would not justify the court of appeals in holding, on the basis of an *incorrect* standard, that respondents' activities are exempt from the federal antitrust laws. At most, the court of appeals would have been justified in remanding the case to the FTC for application of the correct standard.

[2] Respondents err in relying (Br. in Opp. 7) on statements in Commissioner Strenio's separate opinion. A separate opinion is not an opinion of the Commission. The fact that Commissioner Strenio, the author of the Commission's opinion, wrote a separate opinion expressing additional views of his own only emphasizes that obvious point.

that state officials actually determine whether the particular anticompetitive conduct at issue furthers the State's policies:

> Inherent in the active supervision criterion is the notion that the review be meaningful. If review is not meaningful *because a state regulator fails or is unable to evaluate whether rates are "reasonable" as required by statute, then the rates are the product of private and not state action.*

Pet. App. 62a (emphasis added). The Commission explained that merely "checking rates for mathematical accuracy" is not sufficient to meet the active supervision requirement, and also noted that "nearly two dozen endorsements and amendments went into effect without being examined at all." *Id.* at 63a.[3]

2. Contrary to respondents' assertion (Br. in Opp. 5), petitioner's "real" challenge is to the legal standard adopted by the court of appeals. The court of appeals' version of the active supervision test spreads the cloak of antitrust immunity over private anticompetitive conduct that has not been approved by state officials so long as a state regulatory agency is staffed, funded, and engaged in "some basic level of activity." Pet. App. 28a.

Respondents contend (Br. in Opp. 10-13) that the Third Circuit's "some basic level of activity" test is not only "faithful to this Court's state action precedent" (*id.* at 5) but actually "goes beyond" it, *id.* at 13. This Court's cases, respondents argue (*id.* at 10-11), hold that the active supervision requirement is met if "state

[3] Similarly, the Commission observed that Connecticut "regulators could not meaningfully regulate a critical component of the ratemaking process." Pet. App. 59a. As the context makes clear, that statement refers to the FTC's finding that Connecticut insurance officials "lacked the authority to control insurer expenses" as an element of ratemaking. Because Connecticut officials "did not 'exer[t] any significant control over' the terms of the restraint," *ibid.* (quoting *324 Liquor Corp.* v. *Duffy*, 479 U.S. 335, 345 n.7 (1987)), the FTC correctly concluded that respondents' price-fixing was not state action.

statutes grant authority for substantive review of regulated conduct." We disagree. It is true that the Court's decisions in cases such as *Patrick* v. *Burget*, 486 U.S. 94 (1988); *324 Liquor Corp.* v. *Duffy*, 479 U.S. 335 (1987), and *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980), rested in part on the Court's conclusion that state statutes did not confer authority to review the private anticompetitive conduct at issue in those cases. But it does not follow that the active supervision requirement is met simply because a state statute grants state officials regulatory authority. On the contrary, this Court has specifically required that state officials actually exercise the authority to review private anticompetitive conduct. See *Patrick*, 486 U.S. at 101 (state officials must both "have *and exercise* power to review the particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy"; state action doctrine exempts from the federal antitrust laws only those "particular anticompetitive acts of private parties" that, in the judgment of the State, actually further state regulatory policies) (emphasis added); *324 Liquor*, 479 U.S. at 345 n.7 (no state action unless state officials "exert[] * * * significant control over" private anticompetitive activity).[4]

The court of appeals' toothless reformulation of this Court's state action test effectively abandons the active

[4] Contrary to respondents' assertions (Br. in Opp. 6, 9, 12 n.8, 13), nothing in this Court's opinion in *City of Columbia* v. *Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344 (1991), lends support to their position. In *Omni*, the Court declined to recognize a conspiracy exception to the state action doctrine because such an exception would require application of a vague "public interest" test or judicial "probing of * * * official 'intent.'" *Id.* at 1352. Those concerns are inapplicable here, where the issue is simply whether state officials have determined that the private anticompetitive conduct at issue meets the State's regulatory criteria. The Court expressly noted in *Omni* that its decision "does not mean * * * that the States may exempt *private* action from the scope of the Sherman Act." *Id.* at 1353.

The lower court decisions cited by respondents (Br. in Opp. 11 n.5) all were decided before *Patrick*, and thus lend no support to respondents' truncated version of the active supervision test.

supervision requirement, leaving in place only the companion requirement that the restraint be "clearly articulated and affirmatively expressed as state policy," *Midcal*, 445 U.S. at 105. The result is a wholly unwarranted expansion of implied antitrust immunity, particularly where, as here, state officials are authorized, but not required, to review private anticompetitive activity.[5]

3. Respondents, having insisted that this case turns on whether the FTC applied the correct legal standard, then shift their ground to argue (Br. in Opp. 15-21) that the case turns on "a factual dispute between the FTC and the Court of Appeals." *Id.* at 15. That is incorrect. The FTC Act provides that the Commission's findings "as to the facts, if supported by evidence, shall be conclusive." 15 U.S.C. 45(c). With respect to Wisconsin and Montana, the court of appeals' description of the facts did not differ appreciably from the facts as found by the Commission, and the court did not purport to reject any of the Commission's findings of fact or make any new findings of its own. Consequently, the facts as to those States are not "in dispute"—they are the facts as found by the FTC. In Montana, the FTC found that respondents' "rates * * * went into effect without being examined." Pet. App. 76a. In Wisconsin, the Commission found that one filing was checked only for accuracy, another was given only "a cursory reading to the point that the supporting materials * * * were not even checked for accuracy," and nearly two dozen filings were not examined

[5] Because state insurance officials are authorized, but not required, to examine every rate filed with the state agency, there is no basis for presuming (even rebuttably) that the officials have reviewed every rate. In fact, state officials do *not* review many rate filings, including those at issue in this case. Respondents assert (Br. in Opp. 11-12 n.7) that Wisconsin and Montana officials do not have "unfettered" discretion to review rates, because state statutes set out regulatory criteria and direct state officials to enforce those criteria. But a general duty to enforce the law is not the same as a duty to review every rate filing. As Wisconsin and Montana observe (see Wisconsin, Montana et al. Amicus Br. 17), "the insurance commissioner has the discretion to investigate insurance rates and determine whether further action is warranted."

at all. *Id.* at 63a, 199a, 200a. The issue before this Court is the legal significance of these findings, not whether they are correct.[6]

Respondents make two arguments, both invalid, in an effort to transform the legal question presented by this case into a factual dispute. First, respondents resort to extensive citations from the administrative record to conjure up alleged factual disputes. See Br. in Opp. 17-20. Indeed, at one point respondents simply assert (*id.* at 21) that a key finding of fact by the Commission "mischaracterizes the record." The short answer to respondents' arguments from the record is that, just as a court is not free to "make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences," *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 454 (1986) (quoting *FTC* v. *Algoma Lumber Co.*, 291 U.S. 67, 73 (1934)), respondents are not free to substitute their preferred interpretation of the evidence for the Commission's findings.[7]

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[6] The second question presented by the petition concerns whether the court of appeals properly deferred to the FTC's findings of fact as to Arizona and Connecticut. But the Third Circuit's application of its "basic level of activity" test to Wisconsin and Montana demonstrates that it does not require that state officials determine whether respondents' price-fixing is consistent with state policy; the court reached the wrong legal conclusion on the facts it—and the FTC—found as to those two States. Thus, the first question presented by the petition does not depend on resolution of any factual dispute. The second question is presented in the overall context of this case, because proper deference by the court of appeals to the Commission's factual findings concerning Arizona and Connecticut would have made the court's erroneous legal standard determinative as to those States as well. Respondents' statement (Br. in Opp. 15) that the FTC "seeks certiorari only as to Montana and Wisconsin" is flatly wrong. See Pet. 19-20.

[7] Moreover, respondents' description of the record is one-sided. For example, respondents state (Br. in Opp. 18) that a copy of their rate filing in Montana was stamped "reviewed and filed." In fact, the filing was stamped "reviewed and filed for informational purposes." CX 41A. That certainly does not imply any determination that respondents' price-fixing was consistent with the State's policies.

Second, respondents repeatedly assert (Br. in Opp. 14) that "the Court of Appeals concluded that in each of the states at issue, the state regulators in fact 'reviewed the reasonableness of title insurance rates' pursuant to the standards of reasonableness set by state law." See also *id.* at i, 5, 15. Respondents mischaracterize the court of appeals' analysis. The court of appeals did not purport to reject the FTC's factual findings that Wisconsin and Montana did not determine whether respondents' rates were consistent with state policy. Instead, the court merely noted that "[i]n *Midcal* and *324 Liquor Corp.*, the Supreme Court articulated four factors that are pertinent in deciding whether a state actively supervises challenged conduct," including "whether the state establishes the rates" and "whether the state reviews the reasonableness of the rates." Pet. App. 27a (citing *324 Liquor*, 479 U.S. at 345; *Midcal*, 445 U.S. at 105). The court of appeals then adopted language from the First Circuit's opinion in *New England Motor Rate Bureau, Inc.* v. *FTC*, 908 F.2d 1064 (1990), as "most instructive on what type of showing is necessary to satisfy *Midcal's* active supervision prong." Pet. App. 27a. Because Wisconsin and Montana satisfied the Third Circuit's gloss on *Midcal*—*i.e.*, because a state agency with authority to regulate was staffed, funded, and "demonstrate[d] some basic level of activity"—the court of appeals concluded, as a matter of law, that the State both "established" the rates and "reviewed the reasonableness" of the rates (even if in fact no review of reasonableness actually occurred). Whether the Third Circuit's gloss on *Midcal* is a correct modification of the governing legal standard is plainly a question of law, not a question of fact.[8]

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[8] Respondents note (Br. in Opp. 15) that the FTC did not seek certiorari in *New England Motor Rate Bureau, Inc.* v. *FTC*, 908 F.2d 1064 (1st Cir. 1990), even though that decision introduced the "basic level of activity" test applied by the court of appeals in this case. In *New England Motor Rate Bureau*, however, the First Circuit concluded, on the basis of the parties' stipulations, that "the failure to suspend or reject a rate indicate[d] a determination that the rate has been found to meet the [substantive] regulatory

4. Finally, respondents err in contending (Br. in Opp. 5-13) that the court of appeals' decision is required by principles of federalism on which the state action doctrine is based. Indeed, a decidedly contrary view of federalism concerns is powerfully set forth in the brief *amicus curiae* submitted by Wisconsin, joined by 32 other States, in *support* of the FTC's petition for certiorari. The States' brief in support of the petition argues, *inter alia*, that Wisconsin and Montana "do not provide for active review of the filed 'notices' of rates," States' Br. 9; that "Wisconsin and Montana regulators never reviewed title insurance rates and certainly did not review the fixing of search and examination fees," *id.* at 10; and that consumers could not obtain a writ of mandamus from the state courts "because the insurance commissioner's duty to investigate and prosecute is wholly discretionary," *id.* at 18. The brief of the 33 States in support of the petition thus belies respondents' rosy reassurances that state officials reviewed and approved their price-fixing activity. In view of the position of a substantial majority of the States (including Wisconsin, Montana, and Arizona), it is manifest that only the foxes are insisting that they were not left to guard the henhouse.[9]

Respondents accuse the FTC of "overt animosity" to state regulatory regimes of collective rate filings and

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criteria of the statute." *Id.* at 1077. Based on that view of the stipulations, the result reached by the court of appeals—although not the legal standard the court adopted—was correct. Since the court's interpretation of the particular stipulations in that case did not present a question warranting this Court's review, the government did not petition for certiorari. In this case, in contrast, there are no such stipulations or findings.

[9] Respondents' only reference to the States' brief is their statement, in a footnote, that the States "allege[] that Montana and Wisconsin do not authorize collective rate filing." Br. in Opp. 10 n.4. That is so, but the States also argue that "the facts relied upon by the court of appeals would not support a holding that the 'active supervision' prong of this Court's state action test had been met under *Patrick* and *Midcal*." States Br. 4.

"bias against the states' regulatory choices." Br. in Opp. 9 n.3. In fact, as the States' brief makes clear, it is the court of appeals' decision that will restrict the States' regulatory options by conferring immunity from federal antitrust laws on private entities whenever a state agency with authority to regulate engages in "some basic level of activity." The States would be discouraged from engaging in relatively modest regulatory programs that threaten to have such drastic and unintended consequences, to the detriment of the very consumers the States are concerned to protect. As the States observe, "[u]nwarranted expansion of the state action doctrine in such cases leaves the attorneys general and aggrieved consumers powerless to remedy anticompetitive conduct under federal antitrust law, state insurance law or other state regulatory schemes." States' Br. 3.

In short, respondents are correct that principles of federalism counsel "respect for state decision making." Br. in Opp. 6. But federalism does not require—and, indeed, is disserved by—expansion of the state action doctrine to cases in which the State has not determined whether private anticompetitive conduct is consistent with the State's policies.

For the foregoing reasons and those given in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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